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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PAULO FRANCO GUTIERREZ, Defendant and Appellant.	E069009 (Super.Ct.No. FMB17000261) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, Paulo Franco Gutierrez, appeals from the judgment entered following a jury conviction for assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) The jury also found true that defendant had personally inflicted great bodily injury on the victim within the meaning of Penal Code section 12022.7, subdivision (a). The trial court sentenced defendant to five years in prison. On appeal, defendant argues the trial court erred in instructing the jury with CALCRIM No. 3472. He further asserts the trial court had a sua sponte duty to modify CALCRIM No. 3472. We find no error and affirm the judgment.

II.

FACTS AND PROCEDURAL HISTORY

Robert Trevino and defendant were neighbors. Trevino lived at a mobile home park in Morongo Valley. Defendant was staying next door with his girlfriend. On May 1, 2017, the day of the altercation, throughout the day, defendant and Trevino quarreled and challenged each other to fight.

Earlier in the day, Trevino gave defendant's girlfriend a ride to the store. Defendant was drinking and around 2:00 p.m., was intoxicated. A few hours later, defendant and Trevino had a verbal altercation. Defendant was agitated because Trevino had given defendant's girlfriend a ride to the store. Both men challenged each other to fight. Defendant told Trevino that he wanted to kick his butt and kill him. Trevino told

defendant, "'[C]ome on, Dude, I'm out here in the street. Let's go.'" During their earlier confrontation, Trevino did not go onto defendant's property, and there was no physical contact between the two men.

Between 6:00 and 7:00 p.m., Trevino was outside in the street playing ball with a neighbor and her dog. Around the same time, defendant and Trevino continued to exchange words. Trevino's sister, Rosa Rey, and her son-in-law, Erik Hernandez, lived in the mobile home park and heard Trevino yell at defendant, "'Come on. You don't have the balls.'" A little while later, defendant's former daughter-in-law asked Trevino to give her a ride home. Trevino gave the defendant's former daughter-in-law a ride home and then returned to his home.

Around 8:30 p.m., Trevino was inside his home watching television when he heard defendant yell at him from outside. Trevino walked outside to his driveway with a flashlight and shined it on defendant, who was standing in the street. Trevino asked defendant what was going on. Defendant appeared agitated toward Trevino. Defendant said he wanted to kill Trevino because Trevino had given his former daughter-in-law a ride home. Trevino tried to talk to defendant, but defendant punched Trevino. During their scuffle, Trevino noticed defendant was holding a box cutter in his right hand.[1] Trevino grabbed defendant's right hand to protect himself from the blade, causing Trevino to be pushed backed onto defendant's property. Trevino tried to free the knife

[1] Trevino referred to the blade as a "'razor knife.'" However, various witnesses testified Trevino had stated that defendant had cut him with a "'box cutter.'" For consistency, the blade is referred to as a "'box cutter.'"

from defendant's hand. Trevino swung his flashlight, hitting defendant on the right side of his head, causing Trevino to lose the flashlight in the nearby bushes.

Defendant fell to the ground and Trevino straddled him. Trevino tried to end their fight when he said, "'Come on, Dude, wake up.'" Trevino let defendant get up from the ground. However, when both men got up, defendant charged Trevino, causing him to fall back down with defendant on top of him. While he was on the ground, Trevino felt warm blood on his neck and realized he had been slashed with the box cutter. After Trevino realized he had been injured, he threw defendant off of him and defendant ran back into his home. Trevino then walked home because he was going to call 911.

When Trevino realized his neck was severely bleeding, he went to his sister's home for help. Erik opened the door. Erik noticed that Trevino's shirt had blood on it and that Trevino could not stand up and collapsed. Trevino told Erik and Rosa that his neighbor had cut him with a box cutter blade. After paramedics arrived, Trevino told a paramedic that he had been slashed with a box cutter. The paramedic observed Trevino's neck injury and concluded it was consistent with a knife wound.

A deputy sheriff who arrived on the scene to investigate, asked defendant to come out of his residence with his hands up. Defendant complied and explained to the deputy that Trevino had been trespassing on his property and that he had told Trevino to go home. According to defendant, Trevino allegedly responded, "'No, I want to kill a motherfucker.'" Defendant claimed that Trevino had started the fight that evening when he pushed defendant to the ground, and when defendant got back up, Trevino pushed him

down again. Defendant tried to throw dirt in Trevino's eyes to blind him. Defendant also told the deputy that he had picked up a piece of "'wire'" and cut Trevino in the chest after Trevino had punched him but threw the wire in a bush.

The deputy observed defendant that night. He did not have any injuries or cuts to his hands, upper chest, neck and face, nor any blood or scratches on him. The sheriff's deputies searched the area and defendant's residence but did not find a weapon. The deputies observed a trail of blood that led to Trevino's home and to Trevino's sister's home, but nothing leading to defendant's home.

Kathryn Anderson, who lived at the mobile home park, testified that sometime around 7:00 to 7:30 p.m., she heard an argument. Anderson saw Trevino back off the property in front of defendant's home. She heard Trevino say, "'If you wanna fight, come on out here.'" Trevino did not appear to want to fight. Anderson saw Trevino turn and walk into his residence. Anderson also heard defendant's voice but could not see him.

Trevino was hospitalized and received 32 stitches and 18 staples in his neck from the slashes defendant inflicted with the box cutter. As a result of his injuries, Trevino lost feeling on the left side of his face.

III.

DISCUSSION

A. *Propriety of Giving CALCRIM No. 3472*

Defendant argues the trial court erred in instructing the jury with CALCRIM No. 3472. CALCRIM No. 3472 states, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Defendant did not object to CALCRIM No. 3472 in the trial court nor did he request a clarifying or amplifying instruction. The People contend defendant forfeited this issue by failing to raise it in the trial court below. We agree.

B. *Forfeiture*

"'Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818 [Citation.]' [Citation.]." (*People v. Battle* (2011) 198 Cal.App.4th 50, 64-65 citing *People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

During the instructional conference, the trial court went through its intended instructions and directed the parties, "If you agree, say 'yes.' If you disagree, say 'no.'" The court then went through the list and asked, "3472?" Defense counsel responded, "Agree." The record establishes defendant expressly forfeited his claim of instructional error by agreeing to the instruction and not requesting a clarifying or modifying instruction in the trial court.

Defendant contends Penal Code section 1259 permits an appellate court to review and evaluate instructional error even when no objection was made. As a general rule, "'"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete, unless the party has requested appropriate clarifying or amplifying language."'" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) Moreover, defendant has not shown that CALCRIM No. 3472 inaccurately states the law. Instead, defendant argues that *People v. Ramirez* (2015) 233 Cal.App.4th 940, 957, required the trial court to modify CALCRIM No. 3472 because the jury could have concluded that defendant was a mutual combatant.

To the extent defendant failed to request modification of an admittedly otherwise correct jury instruction, his objection has been forfeited. (See *People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Covarrubias* (2016) 1 Cal.5th 838, 901; *People v. Bolin* (1998) 18 Cal.4th 297, 326 [any error regarding wording is waived].) Nevertheless, we will address defendant's objection on the merits.

C. *General Principles Relating to CALCRIM No. 3472*

Defendant claims that CALCRIM No. 3472 misstates the law because it precluded him from defending himself after backing out of the fight with Trevino, even though defendant was the initial aggressor. He argues the trial court had a sua sponte duty to modify CALCRIM No. 3472 to add, "'except that an initial provoker may exercise self-defense if he has first made known his desire to stop fighting, as stated in the previous instruction.'" The People assert the jury was properly instructed with an unmodified

version of CALCRIM No. 3472, and in any event, any error in failing to modify the instruction was harmless.

We apply a de novo review standard to determine whether there has been instructional error. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; see also, *People v. Cole* (2004) 33 Cal.4th 1158, 1211.) We consider the jury instructions as a whole, and in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. (*People v. Wilson* (2008) 44 Cal.4th 758, 803; *People v. Posey* (2004) 32 Cal.4th 193, 218.) Even in the absence of the defendant's specific request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The general principles of law governing the case are those principles closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

In reviewing a claim that jury instructions were incorrect or misleading, we must determine whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.) "'Review of the adequacy of instructions is based on whether the trial court "fully and fairly instructed on the applicable law." [Citation.]'" (*People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287.) "A trial court has no sua sponte duty to revise or improve upon

an accurate statement of law without a request from counsel." (*People v. Lee, supra,* 51 Cal.4th 620, 638.)

However, a trial court must give an instruction if it is supported by substantial evidence while an instruction on an unsupported theory should not be given. (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1172.) "Substantial evidence supporting sua sponte instruction on a particular defense is evidence that is 'sufficient to "deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable [persons] could have concluded'"' that the particular facts underlying the instruction did exist." (*People v. Brooks* (2017) 3 Cal.5th 1, 75.)

Even when instructional error is established, reversal is not required unless it is reasonably probable the defendant would have obtained a more favorable result if his modified jury instruction had been given. (*People v. Breverman, supra,* 19 Cal.4th at p. 178, citing *People v. Watson, supra,* 46 Cal.2d 818, 836.)

D. *Analysis*

CALCRIM No. 3472 "is generally a correct statement of law, which might require modification[,] in the rare case in which a defendant intended to provoke only a nondeadly confrontation and the victim responds with deadly force." (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334; see also *People v. Ramirez, supra*, 233 Cal.App.4th 940, 947.) The CALCRIM No. 3472 Bench Notes state the instruction "may require modification in the rare case in which a defendant intends to provoke only a non-deadly

confrontation and the victim responds with deadly force."

There was a factual basis for the trial court to instruct the jury with CALCRIM No. 3472 because there was evidence that defendant was in the street and initiated the confrontation with Trevino. There was also evidence that defendant immediately brandished the box cutter in his hand when the altercation began. "[T]he self-defense doctrine 'may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." (*People v. Eulian*, *supra*, 247 Cal.App.4th at p. 1333.)

In *People v. Ramirez*, *supra*, 233 Cal.App.4th 940, cited by defendant, there was evidence that gang members, including the defendant, sought out a rival gang for the purpose of an assault. The defendant did not set out intending to shoot anyone. When the defendant believed a rival gang member had a weapon, the defendant responded with deadly force. (*Id*. at p. 944.) The appellate court found the CALCRIM No. 3472 modification was necessary because "the instruction made no allowance for an intent to use only nondeadly force and an adversary's sudden escalation to deadly violence." (*Ramirez*, *supra*, at p. 945.)

Here, there was no need to modify CALCRIM No. 3472 because there was no evidence that Trevino had escalated the fight to require defendant's sudden use of violent force. Rather, the evidence established that when defendant swung at Trevino, Trevino noticed defendant was holding a box cutter. Further, defendant's own statements to the

sheriff deputy do not support the notion that Trevino escalated the fight to justify deadly violence. Indeed, defendant did not tell the deputy that Trevino had any type of weapon during the fight. Rather, defendant explained to the police that Trevino punched him and defendant picked up a "'wire'" and cut Trevino. Therefore, even accepting defendant's version of events, there was no need to modify CALCRIM No. 3472 because the evidence at trial did not support giving a modified instruction.

Even if we were to assume error occurred because the trial court did not instruct the jury with defendant's modified version of CALCRIM No. 3472, defendant cannot demonstrate prejudice. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The ultimate issue for the jury was whether defendant used unreasonable force by slashing Trevino's neck with the box cutter during the altercation.

The record shows the jury was instructed on self-defense. The jury was given CALCRIM Nos. 3470 (Right to Self-Defense or Defense of Another (Non-Homicide)), 3471 (Right to Self-Defense: Mutual Combat or Initial Aggressor), 3472 (Right to Self-Defense: May Not Be Contrived), 3474 (Danger No Longer Exists or Attacker Disabled), and 3475 (Right to Eject Trespasser From Real Property).

Additionally, two jury instructions, CALCRIM Nos. 3470 and 3575 given, explained that the People had "the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense" and the People had "the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable." The jury was also told that self-defense was a legal defense to the charge of assault with a

deadly weapon. The record shows the jury considered defendant's self-defense theory but rejected it.

The jury instructions given did not result in a miscarriage of justice. Defendant's conduct in charging Trevino after Trevino had tried to end the fight and allowed him to get up off the ground, negates the defendant's claim he acted in self-defense. Additionally, defendant admitted to the deputy that he had "cut" Trevino's chest and neck. The night of the altercation, Trevino consistently reported defendant had cut him with a box cutter. There were no defensive wounds observed on defendant. There was no evidence that Trevino had a weapon, and no weapons were found at the scene. The fact that defendant had the box cutter, together with Trevino's severe neck wounds, was substantial evidence that defendant had used unreasonable force in the fight. Consequently, defendant has not demonstrated that he would have obtained a more favorable result had a modified CALCRIM No. 3472 been given. Based on the foregoing, we find no prejudicial error requiring reversal.

IV.

DISPOSITION

The judgment is affirmed.

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SLOUGH
Acting P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.